Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of:	)	
	)	
SBC Petition for Declaratory Ruling That UniPoint Enhanced Services, Inc. d/b/a PointOne and Other Wholesale Transmission Providers Are Liable for Access Charges AT&T's Phone-to-Phone IP Telephony Services are Exempt from Access Charges	)	WC Docket No. 05-276
Petition for Declaratory Ruling That VarTec Telecom Inc. Is Not Required to Pay Access Charges to Southwestern Bell Telephone Company or Other Terminating Local Exchange Carriers When Enhanced Service Providers or Other Carriers Deliver the Calls to Southwestern Bell Telephone Company or Other Local Exchange Carriers for Termination	)	

COMMENTS OF THE UNITED STATES TELECOM ASSOCIATION

The two petitions on which the Commission has solicited comment in this docket address disputes regarding the collection of interstate and intrastate access charges on interLATA voice telecommunications traffic. Many of the carrier members of the United States Telecom Association (USTelecom)[1] rely on the interLATA voice business for a significant percentage of their operating revenues, whether as originators, intermediaries, and/or terminators of such traffic. Accordingly, USTelecom has a vital interest in the Commission's rapid and decisive action on these petitions to minimize harm to the industry and preserve respect for Commission authority.

[1] USTelecom represents communications service providers and suppliers for the telecom industry. USTelecom's carrier members provide a full array of voice, data, and video services across a wide range of communications platforms.

The telecommunications traffic at issue in this proceeding originated on, and continues to originate on, the Public Switched Telephone Network (PSTN), for the most part with traditional telephone equipment. The traffic also terminates on the PSTN. Somewhere between origination and termination, however, each of these calls is carried over Internet Protocol-based transmission facilities (they are often referred to as IP-in-the-middle traffic).

Less than eighteen months ago, the Commission unequivocally ruled in the *AT&T IP-In-The-Middle Order*[2] that IP-in-the-middle traffic is telecommunications traffic, and that it is subject to originating and terminating access charges. The Commission did not resolve any specific access charge disputes, however. Instead, the Commission directed parties with disputes to use the complaint processes established in the Communications Act. Unfortunately, it is proving difficult to resolve one of the first substantial disputes involving IP-in-the-middle through the courts,[3] leading to the filing of the petitions in this docket.

It is troubling that the Commission once again has to address the payment of access charges on IP-in-the-middle traffic. Although the *AT&T IP-In-The-Middle Order* was clear and unambiguous, some interexchange carriers and self-described information service providers are collectively refusing to obey the Commission's decision. Instead, these parties knowingly entered into contractual arrangements designed to terminate PSTN-originated calls on the PSTN without paying Commission-approved access charges, and they continue the charade to this day.

---

[2] *Petition for Declaratory Ruling that AT&T's Phone-to-Phone IP Telephony Services Are Exempt from Access Charges*, WC Docket No. 02-361, Memorandum Opinion & Order, 19 FCC Rcd 7457 (2004).

[3] Current telecommunications business arrangements and legal standards apparently are complex enough to interfere with proper federal district court proper resolution of IP-in-the-middle access payment disputes. *See* Letter dated September 30, 2005 from Eric N. Einhorn, SBC, to Marlene H. Dortch, FCC, WC Docket No. 05-276 (attaching the District Court Order staying the matter).

These ongoing arrangements to use services without paying for them, and the utter disregard for Commission orders demonstrated by the schemes, reflect badly on the telecommunications industry. Indeed, the Commission must act quickly to prevent further disrespect for its rulings, and to preserve the spirit of good faith commercial dealing in our industry.

I. SBC'S PETITION SHOULD BE GRANTED QUICKLY TO PREVENT FURTHER HARM TO THE INDUSTRY, AND TO PRESERVE COMMISSION AUTHORITY.

The SBC Petition[4] asks the Commission to issue a declaratory ruling that wholesale transmission providers are subject to access charges on calls originating and terminating on the PSTN even if they use IP during some part of the transmission and/or hand the traffic off to another carrier prior to delivery to the terminating carrier.[5] Although the Commission has ruled that IP-in-the-middle calls are subject to access charges, SBC finds itself unable to collect access charges from some wholesale providers, including UniPoint. As explained in the SBC Petition, SBC filed a collection action against UniPoint in the United States District Court for the Eastern District of Missouri based on the *AT&T IP-in-the-Middle Order*. That court referred the case to the Commission, however, because it believed that it lacked the necessary technical knowledge and that the case was related to issues currently pending before the Commission.

SBC demonstrates in its petition it has incurred substantial financial burdens performing termination services for UniPoint and VarTec, and other carriers without receiving the

[4] *Petition of the SBC ILECs for a Declaratory Ruling*, WC Docket No. 05-276 (filed Sept. 21, 2005) (SBC Petition).

[5] When this hand-off is to a LEC other than the terminating LEC, it may be inconsistent with routing according to the Local Exchange Routing Guide (LERG). Such use of local termination—delivering the traffic to a LEC other than the terminating LEC without an agreement between the affected parties—may be indicative of intent to avoid access charges.

compensation to which it was lawfully due.[6] Many other USTelecom members are being denied revenue for services rendered at similar rates (in proportion to their relative sizes). The impact is particularly acute for small local exchange carriers (LECs) and those serving rural and high-cost territories, which receive depend on access revenue to cover a greater portion of their operating expenses. The current and growing problem of access charge avoidance is threatening these LECs' ability to deploy broadband reaching all Americans, maintain networks of last resort, and provide affordable and high-quality service to their customers.

Neither retail providers such as VarTec nor IP-based wholesalers such as UniPoint claim that the IP-in-the-middle calls for which SBC is seeking past access revenues are somehow different from the calls specifically addressed in the *AT&T IP-in-the-Middle Order*. Nor could they because the technology is the same: (1) the calls originate and terminate on regular handsets on the PSTN; (2) there is no net protocol conversion, as measured from the beginning and the end of the calls; and (3) customers receive no added functionality. Instead, parties to IP-in-the-middle access avoidance schemes disclaim individual responsibility for paying access charges.

VarTec claims that it does not have a customer relationship with SBC and, therefore, that SBC cannot collect access charges from VarTec.[7] VarTec asks the Commission to declare, among other things; (1) VarTec is not required to pay access charges to a terminating LEC when it uses a self-described enhanced service provider to deliver the calls; and (2) attempting to collect access charges from VarTec would violate 47 U.S.C. §§ 201(b), 203(c).

UniPoint and other self-styled information service providers of IP-based transmission services claim that they are not liable for access charges on PSTN-originated traffic that they

[6] SBC Petition, at 34 (SBC estimates that it is being denied more than $1 million per month in uncollected switched access revenue, for a total of more than $100 million).

[7] VarTec Telecom, Inc., *Petition for Declaratory Ruling*, WC Docket No. 05-276 (filed August 20, 2004) (VarTec Petition).

deliver to the PSTN. These providers base this assertion on their own choice of service definition, by which they erroneously describe themselves as information service providers that are not carriers within the meaning of the Communications Act of 1934.[8] They argue that information service providers cannot be held liable for access charges.

Taken together, these two sets of parties argue, therefore, that the *AT&T IP-in-the-Middle Order* has only limited effect in practice because an IP-in-the-Middle provider and a competitive long distance carrier can avoid the very access charges ordered by the Commission eighteen months ago simply by jointly providing the interexchange component of the call. This argument makes no sense as there is no meaningful difference between the calls that they are handling and those being carried by AT&T, which were the direct subject of the Commission's order. Moreover, UniPoint apparently participated significantly in the advocacy leading up to the *AT&T IP-in-the-Middle Order*[9]and, therefore, UniPoint has no reasonable basis for claiming that it has not understood that its access avoidance arrangements are inconsistent with the Commission's language and intent in the *AT&T-in-the-Middle Order*.

Neither UniPoint (and similarly situated providers) nor VarTec (and similarly situated providers) are innocent parties in the access avoidance arrangements at issue here. Most importantly, both UniPoint and VarTec are benefiting from the access avoidance in these arrangements. UniPoint offered lower prices for its services and won business based on those lower prices from customers that explicitly described using the services for long-haul transport of PSTN-originated calls for PSTN-termination. SBC specifically informed VarTec that SBC was not receiving terminating access charges on IP-in-the-middle traffic coming from VarTec

[8] The determination whether UniPoint is a carrier or an information service provider turns on the service offered rather than UniPoint's statements and/or intent.

[9] *SBC Petition*, at 11.

well before VarTec filed its Petition for Declaratory Ruling in the summer of 2004.[10] Moreover, it was commonly known that UniPoint claimed to be an information service provider, and that it was not paying access charges. VarTec benefited from its arrangement with UniPoint in the form of lower costs for interexchange transport.

Any reasonable person in the position of UniPoint or VarTec would understand that he or she has been using, and continues to use, services without paying for them. Similarly, UniPoint and VarTec cannot seriously deny that their arrangements show complete disregard for the Commission's policies and decisions. Not only are the calls in question indistinguishable when two providers rather than one (the AT&T case) participate in the interexchange segment of an IP-in-the-middle call, but both VarTec and UniPoint knew at the time that the other party was claiming to be exempt from access charges.

The Commission must act quickly and decisively to preserve its authority and protect the customers of local exchange carriers (LECs) that ultimately are paying the price for access charge avoidance. Parties to access avoidance arrangements should not be rewarded for finger-pointing and legalistic arguments. Therefore, the Commission should grant SBC's petition and rule that wholesale transmission providers using IP are acting as interexchange carriers under 47 CFR § 69.5 when they carry PSTN originated calls destined for PSTN termination.

II. VARTEC'S PETITION SHOULD BE DENIED BECAUSE IT IS KNOWINGLY ENTERING AGREEMENTS TO AVOID LAWFUL ACCESS CHARGES.

In addition, the Commission should deny VarTec's petition and, instead extend liability for unpaid access charges to both the interexchange carriers *and* the self-described information service providers that are parties to "least cost routing" arrangements designed to perpetuate

[10] VarTec Petition, *passim*.

access charge avoidance. The parties to those arrangements may then resolve among themselves any disputes about responsibility for access charges without harming LEC customers and undermining the Commission's authority. The Commission should also investigate whether the parties to these "least cost routing" arrangements understood that they were, in effect, providing alibis for each other with the hope of collectively avoiding lawful payment for the access services they used. In fact, not only is VarTec wrong to allege that SBC would violate section 201(b), but VarTec itself may have violated section 201(b).

It is intrinsically unreasonable under section 201(b) for a carrier to do as VarTec did here, namely to persist in routing traffic upon which it knew terminating access charges are due (but not paid) through intermediaries that it knew were refusing to pay terminating access charges, thereby depriving terminating carriers of lawful compensation for the services used to complete the calls. In such circumstances, the carrier has a responsibility to ensure that subsequent providers understand that the traffic is subject to access charges. The carrier also is in the best position to ensure that the appropriate charges are paid as it can change its interconnection arrangements upon learning of problems with payment. Moreover, the carrier can minimize its own risk through the terms of its agreement with the intermediate provider that attempts to evade access charges. This resolution is particularly appropriate at this time given the potential for confusion that has been aptly demonstrated by the underlying court proceedings.

Therefore, the Commission should find that carriers, such as VarTec, are liable to LECs for access charges when they deliver traffic ultimately intended for termination on those LECs' networks to third parties with knowledge that the third party will not pay the access charges. Neither the Commission nor the industry can afford to tolerate situations where such carriers evade access charges by entering into agreements with intermediate providers. In this case, the public interest would be served best if the Commission rules that VarTec and similarly situated carriers are (at least secondarily) responsible to terminating LECs for access charges when delivering PSTN-originated voice traffic to intermediate providers.

At bottom, the Commission is faced in this proceeding with a relatively common legal problem. There is no dispute that the petitioner is owed payment for services rendered, and that the petitioner has been injured by non-payment. Yet, the parties that collectively performed the steps to deliver the traffic to the petitioner each deny individual responsibility, leaving the payment rule un-enforced and the injured petitioner without a remedy. Moreover, reasonable people in the respective positions of the parties denying liability would have anticipated that their actions would harm a third-party—in this case, the terminating LEC. It is imperative that the Commission quickly resolve this problem, and change the incentives of UniPoint, VarTec, and similarly situated providers throughout the country, who can best prevent further harm.

A common resolution under the law is to provide recovery for the injured party and allow the finger-pointing defendants to work out ultimate responsibility among themselves. For example, business partners are jointly and severally liable for partnership liabilities, and parties to contracts are often held to be jointly and severally liable to third parties. Close to home, the Uniform Commercial Code articles for negotiable instruments allow good faith recipients—holders in due course—to seek recovery from the originator of the instrument, and not just from the party with whom they had commercial dealings.[11] The same logic applies here. Therefore, the Commission should state that a terminating LEC may recover the full amount of unpaid

[11] *See* Uniform Commercial Code, Article 3-101, *et seq*. Negotiable instruments are similar to telecommunications in that both are network industries, and transaction costs make it infeasible for the firms involved to enter into agreements with all of the firms involved in the exchanges that create the essential service the industry produces.

access charges pursuant to section 207 of the Communications Act[12] from either the IXC reaping the benefits of access avoidance (in this case VarTec), or the self-described information service provider facilitating access avoidance (in this case UniPoint), or both of them jointly.

III. VARTEC'S REQUEST FOR TRANSITING SERVICE PAYMENTS FROM SBC IS SIMPLY INCORRECT AND SHOULD ALSO BE DENIED.

In addition to seeking Commission protection for access charge avoidance, VarTec requests a separate Commission ruling that a terminating LEC "is required to pay VarTec for the use of VarTec's facilities to deliver transiting traffic when intraMTA calls that originate on the networks of third-party CMRS carriers, transit VarTec's network … and terminate on Southwestern Bell's and any other terminating LEC's network." VarTec claims that its request is supported by the Commission's decision in *Texcom v. Bell Atlantic*.[13] VarTec's claim is incorrect as it has misstated the Commission's decision in that case. Moreover, VarTec's request is inappropriate in any event.

That decision reaffirmed that the point of interconnection between LECs and paging carriers for traffic originated on the LEC's network is at the paging carrier's facilities. It did allow LECs to recover a portion of the cost of facilities (but not transiting services) from the terminating paging carrier because of the unique interconnection rule. Any transit service revenue must still be recovered from the *originating* provider under *Texcom*, and not the terminating provider as VarTec suggests.[14]

Moreover, it is simply incorrect to do as VarTec suggests and transfer to the CMRS-PSTN context an interconnection rule used for the unique circumstances involved with one-way

[12] 47 U.S.C. § 207.

[13] 16 FCC Rcd 21493 (2001), *recon. denied*, 17 FCC Rcd 6275 (2002).

[14] *TSR Wireless v. U S West*, 15 FCC Rcd 11166, 11177 n.70.

traffic originated on LEC networks and terminated on paging networks. VarTec's proposed rule appears to be aimed at requiring the terminating LEC to pay for transport from the CMRS carrier's network to the point of interconnection. This would be directly contrary to the principle that a CMRS carrier is responsible for paying the costs related to its own transport to the point of interconnection (either by building its own facilities or purchasing transit services. Accordingly, the Commission should deny VarTec's spurious request, and VarTec can look for compensation from the CMRS providers that are using its transit service to deliver traffic to LECs.

IV. CONCLUSION

The Commission should quickly grant the SBC Petition and deny the VarTec Petition.

Respectfully submitted,

UNITED STATES TELECOM ASSOCIATION

By:

Its Attorneys:

James W. Olson
Indra Sehdev Chalk
Jeffrey S. Lanning
Robin E. Tuttle

607 14th Street, NW, Suite 400
Washington, DC 20005-2164
(202) 326-7300

November 10, 2005